Nos. 2535, 2536, 2537, 2538, 2539 and 2540.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,
Appellants,

vs.

E. THOMPSON,
Appellee.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,
Appellants,

vs.

CECIL C. CARTER,
Appellee.

CLOSING BRIEF ON BEHALF OF APPELLANTS

CHARLES W. SLACK,
Alaska Commercial Building, San Francisco, and

JOSEPH K. HUTCHINSON,
First National Bank Building, San Francisco,

Solicitors for Appellant.

Filed this .... day of March, A. D. 1915.
F. D. MONCKTON, Clerk.

By....., Deputy Clerk.

The Rincon Publishing Company

Nos. 2535, 2536, 2537, 2538, 2539 and 2540.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,
Appellants,

vs.

E. THOMPSON,
Appellee.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,
Appellants,

vs.

CECIL C. CARTER,
Appellee.

CLOSING BRIEF ON BEHALF OF APPELLANTS

It might well have been hoped, during the twenty-nine long days that, following the oral argument of these causes, appellees labored with their supplemental and closing brief, a mouse more veracious, if not more robust, would have been brought forth. As it is, the brief contains statements which cannot bear the cold, white light of fact. It is the purpose to correct these errata at the outset, and before essaying

the more serious task of meeting the arguments advanced.

ERRATA.

First: As explanatory of the somewhat generous allowance of time granted by appellees to themselves in the preparation of their brief, we find (Closing Brief, p. 5) that appellees "received (from appellants) *nine* days before argument, two briefs—one 110 pages, the other 57 pages in length".

The facts are: (1) Subdivision 1 of Rule 24 of this Honorable Court provides: "The counsel for the * * * appellant shall file with the clerk * * * twenty copies of a printed brief and serve upon counsel for * * * appellee one copy thereof, at least ten days before the case is called for argument." (2) One copy of the brief in cases numbered 2539 and 2540, and one copy of the brief in cases numbered 2535, 2536 and 2537, were served on counsel for appellee on Saturday, January 23rd, 1915. (See admissions of service by counsel for appellees on briefs referred to.) These two briefs were the principal briefs, and contained statements of facts, argument, and authorities applicable alike to all of the six appeals. (3) The cases were called for oral argument on February 3rd, 1915.

Second: On page 3 of Appellees' Closing Brief is this language: "* * * no suggestion was made to the Court by counsel for appellants that a bond should be required, and no demand or request for it was ever made to the Court below. Its attention

was not called in any way to the giving of a bond, and it is difficult for us to conceive how error can be charged against the Court below, when the matter, claimed to be erroneous, was not presented to the Court for consideration, and not decided by it."

As none of the learned counsel signing the Appellees' Closing Brief deemed the matter of sufficient importance to warrant their presence at the lengthy argument upon return of the orders to show cause (Tr., Case No. 2539, p. 38), when the orders granting the injunctions *pendente lite* appealed from were made, it is charitable to suppose that they have either been misinformed or only partially informed.

The facts are: Mr. Charles W. Slack, one of appellants' counsel, in concluding both his opening and closing arguments against the sufficiency of the bills to sustain the injunctions (oral arguments made in open court on December 8, 1914), expressly requested and most vigorously urged that, should the District Court rule with the complainants, they be required to give bond in each of the cases.

Third: The same comments may be made as to the following language (Appellees' Closing Brief, p. 4): "The objection (to the verification) was waived by not urging it upon the Court below."

Mr. Slack on his oral arguments above referred to, presented this point to the District Court most forcefully. Moreover, prominent among the points and authorities (pp. 7, 8 and 9 thereof), on the same day handed to Judge Bledsoe and served upon the gentleman representing appellees' counsel, was the

point, supported by numerous authorities, that, to quote the precise language used: "The affidavits to the bills of Henry E. Lee, insofar, at least, as they relate to allegations upon information and belief, are insufficient".

SUBSTANCE OF APPELLEES' BRIEF.

It must be confessed that there are many difficulties in appellees' chief argument (Appellees' Closing Brief, pp. 10 and 11): that appellants' position is indefensible because predicated upon the proposition that the District Court's decision is incorrect!

From this the facile pen of the logician progresses to this conclusion (p. 11): "It is quite apparent, therefore, that the entire case of the appellants here rests upon propositions of law that nobody disputes, but none of which is applicable to the facts of this case; and this being so, it is apparent, without any further discussion of the record, that there is no ground whatever for the appeals here."

Interwoven with this argument, destructive of appellants' case, is found a quota of reasons given as constructive of appellees' case. They are: (1) The bills present proper cases for injunctions to prevent clouds on title (Appellees' Closing Brief, pp. 11 to 20); (2) The bills present proper cases for injunctions to prevent multiplicity of suits (Appellees' Closing Brief, p. 20); (3) "The accounting feature clearly warranted the granting of the injunctions" (Appellees' Closing Brief, pp. 20 to 25). Another

reason, which will be called No. 4, is hardly susceptible of reduction to terms of the commonplace and the understandable. It is, to use appellees' own phrasing: "The cloud upon appellees' title is aggravated by the shifting of the burden of proof sought to be effected by the California law." And, proposition 5 (found under Roman numeral III, Appellees' Closing Brief, p. 27) cannot be put in language more succinct and pointed than that used by appellees: "The affidavits presented by the moving parties show conclusively that the injunctions were properly granted, and that the motions to dissolve them were properly denied."

Beneath this plethora of reasoning will be found the kernel of two contentions upon the correctness of which the appellees' case must of necessity rest. And this result is reached whether appellees insist upon injunctions to prevent a cloud on title, to prevent multiplicity of suits, or as relief incidental to an accounting.

The first of these contentions holds that the District Court in granting the injunctions disregarded the averments in the bill not positive, acted only upon those positive in form, and found these to be sufficient to support the injunctions. The second of these contentions points to the affidavits filed by the appellants on motions to dissolve the injunctions, as admitting expressly and by failure to deny, and as affirmatively alleging enough, relating to the equities essential to support the injunctions, to make it clear that the injunctions were properly granted and motions to dissolve them properly denied.

The first contention is removed from the obscurity of confusion and evasion by reference to pages 7 and 8 of Appellees' Closing Brief. Here are stated one of the appellants' propositions (*i. e.,* that an injunction *pendente lite* must be supported by a verified statement, as to essential facts, positive, certain, and free from conclusions) and appellees' answer thereto. To abbreviate appellees' language somewhat:

> "The answer * * * is found by quoting from the opinion of Judge Bledsoe. (Case No. 2539) as follows (page 41): 'Laying out of consideration, however, the matters above referred to (*i. e.,* immaterial and "epithetic" matter, and matter alleged on information and belief and not positively) it may be said that certain facts are stated with such positiveness and cogency as that they fall within the realm of indispute upon this hearing.'
>
> "The Judge then summarizes the positive allegations of the bill, and concludes that these positive allegations warrant an injunction."

It is convincing indeed to argue that appellants have no case on appeal because they assert that the decision of the District Court is incorrect. Equally convincing is this easy argument: The injunctions are beyond criticism because in granting them the District Court said, in effect, "In the opinion of this Court there is sufficient material matter so positively alleged in the bills as to support the injunctions." It is conclusive! The Circuit Court of Appeals is firmly bound to turn deaf ear to the appellants' points of error: the District Court has held those points at naught!

Respectfully it is urged by appellants that the District Court committed reversible error in holding these points at naught.

Appellees turn attention to Judge Bledsoe's opinion upon granting the injunctions. They dwell upon the statements therein that only positive averments are considered. "The Judge then summarizes these positive allegations and concludes that they warrant an injunction." (Appellees' Closing Brief, p. 8.)

It is to this summary that the appellants pointed in their briefs (Appellants' Brief in Cases 2539 and 2540, pp. 48 and 49; Appellants' Brief in Cases 2535 to 2537, pp. 37 and 38) as embodying one of the District Court's errors. In this summary the Court takes as sufficiently before it, as clear, positive and verified testimony in support of complainant's right to an injunction, the two most vital matters of complainant's case: (1) That defendant Pack did not expend or cause to be expended of his own money, during 1911 and 1912, or at any other time, the sums claimed in his Notices of Forfeiture to have been spent by him, and for which contribution from complainant was demanded; (2) that at least $2836 was contributed by complainant and his co-locators to Pack for the purpose of doing assessment work on the claims for 1911 and 1912.

This is not tantamount to a trial court's finding of fact upon conflicting evidence. No more is it a conclusive determination of any other sort by which the Appellate Court is bound. It is challenged directly and vigorously by the appellants. And as ground

for their objection they turn to the bills of complaint, and ask consideration of the only averments in those bills upon which the District Court could have based its conclusion as to these matters indispensable thereto.

Appellants in their briefs, filed prior to oral argument, took pains to deal at some length with the averments found in the bills, on these points essential to appellees' cases. (See Appellants' Brief in Cases 2539 and 2540, pp. 49-57; Appellants' Brief in Cases 2535 to 2537, pp. 37-47.) Nowhere in any of appellees' briefs are appellants' arguments upon these points met. Rather, discussion by appellees of the averments assailed is studiously avoided. "The District Court said they were sufficient and positive, therefore they are," constitute the only forces rallied by appellees to defend the bills in these all-important respects. (See Appellees' Closing Brief, pp. 8, 12, 14, 15, 16, 23, 26 and 27.)

There are therefore no counter-arguments on these points to be met by appellants. Lengthy discussion approaches repetition of the matter already before the Court in appellants' brief first filed (see references to these briefs, *supra*). One thing is certain, however. If the defendant Pack did not make the expenditures at all or do the work at all claimed in the Notices of Forfeiture, the English language offers to a frank witness seeking to assert those facts in clear and definite terms ample means of removing all obscurity and uncertainty from his statements, and full protection from any charges of evasion or lack

of frankness. How does complainant make use of these means? He does not say "I swear positively that Pack did not spend any money at all; I swear positively that Pack did not do any work at all." Instead, complainant is furtive and cautious. "Pack did not spend any of his own money", asserts the complainant. Whether this be positive or on information and belief, may not be known, for later in his solemn statement to the Court he says, "On information and belief I swear that Pack never expended any money whatsoever." Complainant was dodging something. Was it not the heavy responsibility of the unequivocal statement under oath that Pack did not do any work whatsoever or spend any money whatsoever? If the conclusion is not irresistible, it is so persuasive as to bring suspicion into the eyes of the Chancellor, so wary of those whose stories stumble in the telling.

At this juncture attention is called to the fallacy of the proposition found at the top of page 14, Appellees' Closing Brief: That it is essential that the co-owner seeking to "forfeit out" his delinquent co-owners must have *paid* for the work performed or improvements made by him or caused by him to have been made. While doubtless true that work done by *all* co-owners cannot be used by one, who has not paid all the expenses thereof, as a basis for forfeiture proceedings, yet if one co-owner, individually, does the work, or causes it to be done, thereby rendering himself individually and alone liable to pay therefor, he has as mature a right to

demand contribution under U. S. R. S., Section 2324, from his co-owners, and upon their failure to contribute to "forfeit them out", as though he had fully paid for the work.

Big Three Min. & Mill Co. v. *Hamilton,* 157 Cal. 130-143;
Lindley on Mines (3d ed.), Vol. 2, Sec. 635, p. 1579;
Snyder on Mines, Sec. 492.

From this it may be seen that even to definitely negative payment by Pack is not to destroy his right to forfeiture proceedings against complainant. In addition, performance of the work or making of the improvements by Pack must also be negatived.

Surely, had the work not been done at all, a complainant who is so valorously defending his interest in the claims from forfeiture proceedings (instituted more than two years after the performance of the work) would have had sufficient interest in the property to have kept himself informed as to whether or not work had been done thereon by any one. In in other words, had the work not been done, it is surely reasonable to expect a flat assertion by complainant to that effect. In its absence is it wholly unreasonable to presume that the work was done—and *not* by complainant?

Moreover, there is for use in just such situations as the present one a rule preserved to the Chancellor through numberless years that "It is to be presumed that plaintiff has stated his case in his complaint as favorably to himself as he can."

Morrison v. *Land,* Supreme Court State of California, in Bank, March 6, 1915. Sacramento No. 2259.

To peruse Appellees' Closing Brief is to become convinced that even appellees have abandoned the position taken by them on return of the orders to show cause: that the bills show cases for injunction because it appears therefrom that the work was not done. Now it is asserted that (1) the work was not paid for by Pack (Appellees' Closing Brief, p. 14) and (2) that Pack had in his hands $2836 contributed by complainant and his co-locators towards the performance of the work in 1911 and 1912 (Appellees' Closing Brief, p. 15). Both these propositions presuppose the performance by Pack of the labor.

Another thing is certain. The same ample means of candid and clear expression open to complainant in reference to the alleged nonpayment by Pack for the assessment work, were open to complainant for his statement of the facts as to the alleged contribution of $2836 by complainant and his co-locators. A single offense against the rules of candor and clearness might possibly be passed over as only a persuasive argument that there had been evasion. The second offense as to so necessary a fact as this matter of contribution would seem beyond all question to deprive complainant of the attentive and indulgent hearing granted to the honest petitioner. Complainant, through affiant Lee, says: $1000 was paid by said Lee, as agent of complainant, and his co-locators, to Pack as a portion of their pro-rata

contribution for the assessment work for 1911 and 1912. Given its fullest weight, this would amount to a contributory payment by Lee of $125 for complainant's portion of at least $800 due for work on twelve claims for 1911, and on 44 claims for 1912. How was this generous and alleged payment to be divided between 1911 work and 1912 work? Was this munificent sum of $125—sufficient to pay complainant's portion of the assessment for one year on only ten claims—to be distributed equally to ten claims? If so, which ten claims were to be so favored? We do not know these things, nor does complainant, through affiant Lee, who verified the bill and was the very man who paid the money, enlighten us thereon. Truly this $1000 payment does service in many causes.

But the $1000 is not the only amount mentioned by complainant. A larger sum, $1836, goes to make up the $2836 that, said the District Court in its opinion, was contributed by plaintiff and his co-locators to Pack for the purpose of doing the assessment work for 1911 and 1912 on the claims involved. The actual money in this amount is elusive. When one seeks to lay hands on it one finds that the defendant Pack "duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of plaintiff, and his co-locators, in the sum of $1836", and that Lee, acting as such agent for plaintiff and his co-locators, directed Pack to use all of said money in the annual representation of the claims. Was Pack really indebted to Lee? There is no

pleading before us from which we can reach that conclusion. There is a statement of an *evidentiary* fact which might, if properly bolstered up with other more important evidentiary facts, lead to such an ultimate fact. But as for the ultimate fact, either the actual payment of money, or an actual indebtedness due and unpaid from Pack to Lee, and rightfully subject to Lee's alleged direction to apply it to the use of complainant and his co-locators—that is to be found only in Judge Bledsoe's opinion and in the erudition of counsel's comprehensive briefs.

With fine discrimination counsel appeals to the rules of *evidence* to sustain their *pleading*. On page 19 of their closing brief, vigorously italicized, we read: "Had Lee, for example, sued upon the I. O. U., the production of the written instrument would make out his case, and if the defendant offered no further evidence, judgment would follow in his favor."

"This makes the situation very clear," as counsel so aptly put it (Appellees' Closing Brief, p. 19).

Grant the far-fetched argument as to rules of evidence, disregarding as it does the danger attendant upon a full examination of Lee and upon an attempt to enforce payment of moneys never owing, and yet the rules of pleading would never permit Lee as plaintiff upon the I. O. U. to even proceed as far as trial in the absence of an allegation of non-payment. Yet, no allegation of non-payment, or of maturity for other reasons, appears in the bills before us.

So much for the props placed by appellees beneath the allegations of the bills standing alone, and already sagging beneath the weakness of their own infirmities. As matters of law, appellees assert (1) that the injunctions were warranted to prevent multiplicity of suits; (2) that the accounting feature warranted the injunction.

MULTIPLICITY.

Both in the Appellants Opening Brief (pp. 81-85, 89-91) and in their oral argument they stressed the circumstances that make it impossible for the appellee effectively to justify the injunction, or its maintenance in force, by his fear of a multiplicity of actions. Not only was he amply protected, under the facts of the instant cases, by the doctrine of *lis pendens,* but in any event his expressed fear was groundless—no suits had multiplied or could multiply; all his rights could be protected, against all comers, in this action. Nevertheless, the appellee has defended the orders appealed from on the ground that a threatened multiplicity of actions existed against which equity properly interposed its buckler (Brief, pp. 6, 8-9), and now again, as also at oral argument, reiterates his reliance upon that ground as a basis for the action of the District Court (Supplemental Brief, p. 20). Yet in all three instances he has cited but one case to the point, one which his counsel, however, has stated to be on "all-fours" with *this* case. The appellants are only too

glad to have this particular decision called to the attention of this Court.

McConnaughy v. *Pennoyer,* 43 Fed. 339.

For the case adds force to the contention of the appellants. A sale actually threatened by state officers of some 50,000 acres of land, which under the law could not be sold "in larger quantities than 320 acres to any one person" (p. 342), was there enjoined. The act enjoined was of such a character that, had it been permitted, a multiplicity of suits must necessarily have followed. As Judge Deady says (p. 342):

> "The disposition of this large tract of land in this manner may involve at least 150 sales, to as many different persons. If such sales are allowed to be made, the plaintiff will be compelled, in the assertion and maintenance of his right, to bring a separate suit in equity against each of such purchasers to quiet title or to charge him as a trustee of the legal title for the benefit of the plaintiff, the owner of the equitable estate.
>
> "This presents a very strong case of a multiplicity of suits, that may be prevented by this suit, in which the whole matter may be considered and determined at once, and thus save expense and delay to all persons concerned."

Such is not our case. The act here enjoined did not necessarily bring, or even threaten to bring, some 150 or in fact any concomitant suits in its train. And, even if it had, the McConnaughy case would be authority only for an injunction against *a sale, pendente lite,* of the property involved, and not for one

against the recordation of an instrument which did not concern third persons and whose validity and effect could be finally determined in this single action. Had the injunction in each of our cases been one inhibiting the appellants from selling, prior to final judgment, the one-eighth interest in the placer mining claims to which both they and the appellee assert a right, Judge Deady's decision might, possibly, be cited to sustain the orders appealed from. As it is, however, the decision is a weak support for the orders actually made in the present instance. In our case it should have been said, as was said by another District Court when asked for an injunction against the creation of a cloud on title, on the ground that such creation would result in a multiplicity of actions:

> "There is nothing upon the face of this bill to lead one to the conclusion that there is a multiplicity of suits involved in the pursuit of the legal remedy. We are of the opinion, upon a reading of the bill, that the very reverse is the case, and that the controversy between these parties may be determined in one suit at law."
>
> *Richardson* v. *Pennsylvania Coal Co.,* 203 Fed. 743, 750.

> "' * * * A court of equity will not exercise jurisdiction on this particular ground, unless its interference is *clearly necessary* to promote the ends of justice and to shield the plaintiff from a litigation which is *evidently vexatious.* (1 Pom. Eq., Sec. 254.)
>
> "In 1 High on Injunctions (2d ed.), Sec. 61, it is said:
>
> "'Equity will interfere * * * to restrain useless and vexatious litigation * * *'

"The facts asserted in the bill do not warrant a belief that Brown will institute vexatious litigation. See, also, *Boise Co.* v. *Boise City,* 213 U. S. 276, 286, 29 Sup. Ct. 426, 543 L. Ed. 796; 22 Cyc. 769. It has been well said that:

"'Mere apprehensions or fears on the part of the person seeking relief that the defendant may institute actions against him in the future will not warrant a court of equity in enjoining the bringing of such actions.' 1 High, Injunc., Sec. 64.

"The bill here asserts apprehension on complainant's part, but does not allege threats by Brown."

United Cigarette etc. Co. v. *Winston Cigarette etc. Co.,* 194 Fed. 947, 959 (C. C. A., 4th Circ.).

AS TO RIGHT TO AN ACCOUNTING.

The state in which are found the bills of complaint on which appellees' cases depend renders unnecessary discussion of the question as to whether or not, under proper allegations, equity would take jurisdiction of cases of this character for the purpose of compelling an accounting. Still more unnecessary is a discussion of the question as to whether or not, as incidental to an accounting, equity would, in these instances, sanction injunctions. The bills of complaint are lacking in, not only one, but many of the requisites of a sufficient bill for an accounting. And, no matter what facts might actually exist, failure to present those facts to the court according to well settled rules of equity pleading, deprives the litigant, at least until amendment, of the right to equitable relief in general, and

injunctive relief, in particular. That is to say, the right may exist, but it must be properly asserted before it can be recognized, and prescribed and established remedies for its assertion must be pursued.

As matter of substantive law, and therefore going to the very root of appellees' cases, the bills seem to make indubitably clear the absence of the essential fact that there must be a balance due from the defendants to the complainants. (1 Corpus Juris, p. 639, sec. 87, and numerous cases there cited.) At any rate, there is no allegation of that fact (1 Corpus Juris, p. 635, sec. 104, and numerous cases there cited). Nor can even the vivid imagination or the deft touch of counsel supply the deficiency. Other objections, based upon non-compliance by complainant with the rules of the adjective law, are: No complexity of accounts is shown (1 Corpus Juris, p. 634, sec. 100); no fiduciary relations are shown (1 Corpus Juris, p. 634, sec. 101); no demand for an accounting and refusal to account is shown (1 Corpus Juris, p. 635, sec. 103; also the case of the *United Cigarette Mach. Co.* v. *Winston Cigarette Mach. Co.,* 194 Fed. (C. C. A.) 947, is of value as to all of the above-mentioned points.)

BALANCE OF CONVENIENCE.

We discussed at some length in the appellants' opening brief (pp. 73-91), and again at the oral hearing, the circumstances that the District Court erred in not applying, as a guide to the exercise of its discretion,

the test of the relative inconveniences of the parties, its failure to apply such test being made manifest, we urged, by the fact that it granted and maintained in force, in order to protect asserted rights which were or could have been otherwise adequately protected, an injunction, whose most immediate effect was to impair, or at least to cloud, the rights claimed by the appellants. The appellee has but barely attempted to meet this argument. His present supplemental brief does not touch upon the question. His earlier argument (pp. 10-13) depended solely upon the hypothesis that Section 1426 o of the Civil Code of California, in providing a limiting period of 90 days within which the required notice and affidavit "must be recorded", was not mandatory, and upon the careless assumption that, if there was any doubt whether or not the provision *was* mandatory, the District Court was justified in casting all the substantial risk of possible litigation and loss upon the appellants. Even though the *statu quo*, as to all parties and rights, could have been preserved by the adoption of another course.

This argument of the appellant was anticipated, and we submit sufficiently met, in our opening brief (pp. 77-8). It was not the province of the Chancellor to act upon the presumption that in preventing compliance by the defendants with the positive terms of a statute he was not affecting their rights, or not affecting them so seriously but what his final decree could repair the injury. He should have permitted such compliance, and his final decree could then have de-

cleared whether or not the appellants, by their *completed* forfeiture proceedings, had acquired the appellees' original title. True enough, the Court in its opinion assumes, or is "frank to say", that its final decree, if in favor of the appellants, will be (Supplemental Brief, p. 38):

> "Of considerable higher standing and integrity and greater in force and efficacy than any affidavit of forfeiture he (they) could file in the recorder's office."

But what assurance have the appellants that the Court is right on this point and that the final decree *will* have the standing it claims, in the face of the fact that they will not have complied with the apparently mandatory provision of the state statute? Moreover, although the appellee is meanwhile restrained from selling his title, which on the record is clear, what is to prevent him, prior to the actions coming to issue, from dismissing the bill and so disposing of the injunction, selling his interest to third parties, and leaving the appellants where the all-powerful decree of the District Court cannot be made? In spite of all that may be said, whatever risk there is in the situation has been cast upon them.

The following authorities may be added to those already cited by us to the point that the relative inconveniences should always be balanced.

Child v. *Douglas*, 5 De G., M. & G. 739, 741-2;
Barnard v. *Gibson*, 7 How. 649, 657-8;
Dun v. *Lumbermen's Credit Ass'n*, 209 U. S. 20, 23-4;

American etc. Co. v. *Eli etc. Co.,* 76 Fed. 372, 374 (C. C. A., 7th Circ.);

D. & R. G. Co. v. *U. S.,* 124 id. 156, 161 (C. C. A., 8th Circ. Order granting preliminary injunction modified on this ground);

Northern Securities Co. v. *Harriman,* 134 id. 331, 332, 340-1 (C. C. A., 3rd Circ. Order granting preliminary injunction reversed on this ground. Aff. 197 U. S. 244, 287, 299);

Colorado Eastern R. Co. v. *C. B. & Q. R. Co.,* 141 id. 898 (C. C. A., 8th Circ.);

Mountain Copper Co. v. *U. S.,* 142 id. 625, 638 (C. C. A., 9th Circ. Decree granting final injunction reversed on this ground);

Shannon v. *U. S.,* 160 id. 870, 876 (C. C. A., 9th Circ.);

McCarthy v. *Bunker Hill etc. Co.,* 164 id. 927, 940 (C. C. A., 9th Circ.);

Kryptok Co. v. *Stead Lens Co.,* 190 id. 767, 769 (C. C. A., 8th Circ. Order granting preliminary injunction reversed on this ground. See bottom p. 771).

Also the following recent cases from the various District Courts:

Contra Costa Co. v. *Oakland,* 165 Fed. 518, 533 (injunction granted, but bond of $130,000 required, Gilbert, C. J.);

Spring Valley v. *San Francisco,* 165 id. 667, 710-3 (injunction granted, but on terms, Farrington, D. J.);

Bliss v. *Anaconda C. M. Co.,* 167 id. 342, 366 (injunction refused, Hunt, D. J.);

Pacific etc. Co. v. *Los Angeles,* 192 id. 1009, 1010 (temporary injunction granted, but bond required, Wellborn, D. J.);

Gillette Safety Razor Co. v. *Durham Duplex Razor Co.,* 197 id. 574, 576;

Wilmington City Ry. Co. v. *Taylor,* 198 id. 159, 197-8;

Carlisle v. *Smith,* 200 id. 268, 269;
Cubbins v. *Mississippi etc. Commission,* 204 id. 299, 307;
South & North etc. Co. v. *R. R. Commission,* 210 id. 465, 483.

The test is also applied, of course, by the Courts of this State:

Hicks v. *Compton,* 18 Cal. 206, 210;
Real Del Monte etc. Co. v. *Pond etc. Co.,* 23 id. 83, 84-5;
Paige v. *Akins,* 112 id. 401, 412;
Williams v. *Los Angeles Ry. Co.,* 150 id. 592, 596;
Willis v. *Lauridson,* 161 id. 106, 117.

Valuable notes on the importance of the "comparative injury" test may be found in

14 Am. & Eng. Ann. Cases, p. 19; 26 id., p. 248; 31 L. R. A., N. S. 881; 39 id. 3 (Note to *Kryptok Co.* v. *Stead Lens Co.,* 190 Fed. 767).

See, also, Chief Justice Bean, in reversing orders granting temporary and permanent injunctions, in the case of

Mann v. *Parker,* 48 Ore. 321, 325; 86 Pac. 598, 599.

DOCTRINE OF LIS PENDENS.

One or two authorities may be added to those cited in our opening brief to the effect that where a notice of *lis pendens* will protect a party an injunction should not issue.

"Upon the showing made, the question here presented is whether plaintiff is entitled to injunctive relief and the appointment of a receiver. The *mining claims* are made a subject of the litigation, being specifically described in the complaint. *Whoever deals with such claims must deal with them with notice and knowledge of the suit pending concerning them, and it is not apparent how plaintiff's rights as to these can be affected to his detriment. So it would seem that there is no need of an injunction* or of a receiver for the protection of plaintiff's rights therein." (Italics ours.)

Greenberg v. *Lesamis,* 203 Fed. 678 (C. C. A., 9th Circ.)

In a New York City case Chief Justice Barbour, reversing the lower Court, said:

"The filing of a *lis pendens* notice will more effectually preserve the equitable interest which the plaintiff may have in the lands themselves against a sale and conveyance by the defendants, than would an injunction restraining the owners in fee from selling the same; inasmuch as the former would be, in law, a notice to every purchaser, however innocent, while the latter would not. As, then, the interests of the plaintiff in the lands could have been fully protected by the filing of a *lis pendens,* it follows that an order enjoining the defendants and appointing a receiver was unnecessary, and, therefore, improper."

Gregory v. *Gregory,* 1 J. E. S. (33 Ny. Superior) 1, 34 (Jones, J., concurring, p. 38).

The same principle is applied where the title to intangible personal property, such as shares of a corporation, is involved. In a recent New Jersey case

brought by a corporation against the legatees of a testator to obtain a decree that certain stock, ostensibly his, had been held by him as trustee for the corporation, a preliminary injunction was sought restraining the legatees from disposing of the stock. The Chancellor held such relief was unnecessary, under the doctrine of *lis pendens,* saying:

> "There still remains the question whether there is in this case such facts as show a reasonable apprehension of danger of loss or injury to the rights claimed by the complainant if the defendants be not enjoined from transferring their shares. The affidavits of Mrs. Taylor and her son disclaim an intention to dispose of their shares, and seem to be as full and fair in this respect as though stated in an answer. In addition, it seems clear that if this principle be correct and applicable here, the effect of it would be, *in view of the pendency of this bill* and of the facts adduced in it, the shares would still be impressed with the trust claimed, *and any one taking them from the present holders would take with notice of any existing rights of the company respecting them. Therefore, there is no need for the protection of the injunctive power of this Court, which should, of course, be exercised with caution."* * * *
>
> "It seems clear that the same reasons for declining to enjoin the disposition by Mrs. Taylor and her son of their shares of stock apply to the similar relief sought respecting the shares held by Parsons. If the shares of Franklin Taylor were impressed with the trust, and remained so impressed in the hands of Mrs. Taylor, then if Parsons has not fully paid for the shares which he got from Mrs. Taylor, they may be still so impressed, except as to the amount he paid therefor prior to notice. There is, as to these shares, also

an absence of a threatened danger of a change of their status which would be likely to injure the complainant, or defeat the rights which it asserts in the bill and the amendments thereto.

"On the whole, then, after considering with care the many affidavits (but without reviewing them) and the contentions, it seems clear that *the complainant does not need the protection of the preliminary injunction sought* for any of the reasons urged, and, therefore, is not now entitled to it." (Italics ours.)

American Vulcanized Fibre Co. v. *Taylor et al.* (N. J.), Eq. 1913, 87 Atl. 1025, 1027.

To the same effect are many other authorities:

Edwards v. *Banksmith,* 35 Ga. 213;
Powell v. *Quinn,* 49 id. 529;
Matthews v. *Cody,* 60 id. 357;
Bell v. *Sappington,* 111 id. 391, 395; 36 S. E. 780;
Tabb v. *Williams,* 4 Jones Eq. (N. C.) 352;
Livingston v. *Hallenbeck,* 3 How. Prac. 343, 349.
Mills v. *Mills,* 21 How. Prac. 437;
Stevenson v. *Fayerweather,* 21 How. Prac. 449;
Mariposa Co. v. *Garrison,* 26 How. Prac. 448, 449;
Fitzgerald v. *Deshler,* 23 J. & S. (55 N. Y. Superior) 91; 18 St. Rep. 866;
Van Rensallaer v. *Kidd,* 4 Barb. 17, 19;
Waddell v. *Bruen,* 4 Edw. Ch. 671;
1 Spelling on Injunctions (2d ed.), Sec. 195;
Bennett on Lis Pendens, Sec. 146.

THE CASES IN THE LIGHT OF DEFENDANTS' AFFIDAVITS.

Appellees dwell at length upon what they are moved to call the damaging admissions to be found in

the affidavits filed by defendants and appellants on their motions to dissolve the injunctions. Heavy hand is laid particularly upon Pack's allegations with reference to the all-important "payments" of $1000 and $1836.

On page 16 of Appellees' Closing Brief, after referring to the transcript in case 2540, page 71, we find: "Here we have an admission that a thousand dollars of the $2836 referred to was paid." This may be granted, but there are other facts alleged of which due notice should be taken. First, as to case 2540, involving 44 claims, the statement, as to the receipt by him of $1000 in January, 1912, is coupled by Pack with assertions that the money was not paid for or on behalf of complainant and his co-locators, or any or either of them, but, to the best of Pack's knowledge and belief, solely on behalf of Lee (Tr., case 2540, p. 72), the omnipresent champion of complainant's rights. Significant also is the positive assertion (Tr., case 2540, p. 70) that Pack has never been indebted to complainant or his co-locators, or any or either of them, or to Lee, in any sum whatsoever. And the averments, clear and positive as to Lee's indebtedness to Pack, cannot be entirely passed over. Even grant that the $1000 was paid on behalf of complainant and his co-locators and it appears (Tr., case 2540, pp. 63 and 64) that this very Pack, in 1910, paid out of his own pocket every expense of locating these claims in which complainant asserts an interest, and that no part whatsoever of any of these expenses has ever been repaid to Pack by complainant. Nor is there

aught to show, to go still further, that Pack has not credited to the complaint the latter's full proportion of the $1000, and naught to show that, despite such credit, Pack does not still find complainant delinquent as to the amount named in the Notices of Forfeiture. Lastly, to give complainant's assertions their greatest weight, the insignificance of the amount, in relation to Pack's claims, to which complainant would be entitled to credit out of the $1000 has already been commented upon hereinabove.

In any event as to case 2539, Pack's affidavit, involving 12 claims, as to the $1000, exhibits a material difference from that in case 2540. In case 2539, Pack positively avers that the money was paid, not in 1911, but in January, 1912; positively denies that it was paid by Lee as the agent of complainant; denies that it was ever paid by Lee for the purpose of doing work for 1911 on the claims involved; denies that any of said sum was so applied and used. In other respects, the affidavit in case 2539 follows that in case 2540.

The "payment" of the $1836 has already been somewhat thoroughly discussed. There is equal application of these comments made upon the bills standing alone to the situation as we find it in the light of the defendant and appellant Pack's allegations with reference to this "contribution". Assuredly it cannot be said that even in the remotest way does Pack admit the receipt by him of $1836 in money or its equivalent. His admissions with reference to the execution and existence of the I. O. U. exhibit a much greater willingness to communicate to the Court

in detail the facts surrounding this transaction, than affiant Lee, on behalf of the complainant, has at any point in his statements shown. To one closely reading for the first time the affidavits of the appellants, and with them the assertions of affiant Lee, there cannot but be borne home an impression, becoming with re-reading a conviction, that affiant Lee has something to conceal, that somewhere in the structure of his case there is weak timber of which the Chancellor must be kept in ignorance. Contrast is found in appellants' affidavits. Full disclosure is made, clumsily, perhaps, but none the less with a very apparent desire to place all the facts, both pro and contra within the Court's scrutiny.

AS TO THE BOND.

It may not be amiss to point out, further, that the appellee has mistaken our point in stressing the failure of the District Court to require a bond of the complainant as a condition to the issuance or maintenance in force of the injunction. We recognize that the requiring or dispensing with a bond is a matter within the discretion of the Chancellor, and that therefore it cannot be said, as the appellee would have us say, "that the Court below committed error in not requiring a bond" (Supplemental Brief, p. 3). What we did urge in our opening brief (pp. 94-100) and now repeat is that in a case of this kind, where the defendants' financial responsibility was unquestioned and that of the complainant was directly ques-

tioned, and where the injunction might irreparably injure the defendants, the fact that the Court did not see fit to require any security for the protection of the defendants is persuasive of its failure to apply or even consider the test of relative inconveniences. Even had the rights of the appellee been clearer and more certain of eventual success than in fact they were, on the record before the District Court, the case was one for a conditional order, granting an effectual remedy to all parties, yet affording some optional latitude of action to the appellants, such as an order which would

> "stop the appellants by injunction unless they gave a bond, providing, on their failure to do so, the appellee gave a bond to indemnify them".
>
> *City of Grand Rapids* v. *Warren Bros. Co.*, 196 Fed. 892, 897 (C. C. A. 6th Circ.).

See, also:

> *Jackson Co.* v. *Gardiner etc. Co.*, 200 Fed. 113, 114, 118-9 (C. C. A., 1st Circ.);
> *Coca-Cola Co.* v. *Nashville Syrup Co.*, 200 id. 153, 156.

Moreover, this point was expressly drawn to the attention of the District Court. One of the grounds upon which were based the motions to dissolve the injunctions was "that the order (for the injunctions) does not provide for any security for defendants' costs and damages and it appears from the affidavits served herewith that complainant is financially irresponsible". (Tr., case 2539, p. 48.)

GENERAL CONSIDERATIONS.

To follow appellees' arguments, as well as they may be followed, down to the present point is to be again confronted with the realization that no effort whatever is being made by appellees to look upon the cases with the broad vision that equity, with its rules of the balance of convenience, and reluctant issuance of injunctions, demands of cases such as these. "Look to the facts", it is exclaimed. "Appellants admit all that we assert, and more." For the sake of argument, grant this, and still there remain unanswered such fundamental inquiries as these:

1. Were there not other methods of relief, as salutary as and less drastic than injunctive relief, open to appellees, and therefore more properly to be invoked than the restraint of equity?

2. Is not the public policy expressed in U. S. R. S. 2324 subverted by the establishment of a precedent that will permit an owner, who is delinquent as to and in the debt of a co-owner, to thwart the designedly summary and expeditious remedy of forfeiture?

An affirmative answer to either of these queries serves to undermine the foundation of the District Court's action.

Under the head of the first of these questions the application of the doctrine of *lis pendens* is prominent. If the forfeiture proceedings were fraudulent or instituted without right, would not a bill to cancel them or a bill to quiet title, with the accompanying notice *in rem* of the pendency of the action, serve appellees' end with even greater effect than injunc-

tion, and with equal safety? And this without subjecting appellants to the hardship that cannot but be presumed to, and in these present cases most certainly does, follow prohibitive measures? Is not the present procedure adopted by appellees a misconception of an effective remedy? Has not the mere lapse of ninety days from the time of service of the Notices of Forfeiture already worked the harm appellees fear so greatly, and completed the divestiture of their title? How can their prayer "that forfeiture be prevented" be granted?

Also under this same head there can be no escape from meeting and answering the question: If appellees actually have contributed their proportion due for assessment work, why have they not protected themselves behind the simple and satisfactory provisions of Section 1426o of the California Civil Code? Why have not appellees, under this provision, recorded the affidavits of payment provided for thereby? Either appellees have overlooked this remedy, to appellants' detriment, or they have not actually contributed moneys, or they recognized the fact that what they have paid is but a fraction of what they should have paid.

The impropriety of the injunctions on grounds of public policy seems entitled to the gravest consideration. The creation of an engraftment upon the body of the forfeiture statute, especially under such facts as those at bar, where it affirmatively appears by most persuasive inference that the delinquent co-owner is in fact a debtor of him who would "forfeit out" the

former, would make of a summary proceeding a creature of delay and technicality. Of still greater force does this argument become when it is noted that no protection is thereby denied the alleged delinquent; a bill to quiet title, to cancel the forfeiture, or to declare the co-owner, in whom forfeiture proceedings wrongfully undertaken have vested the legal title, a trustee thereof for the alleged delinquent, afford ample relief and safety.

AS TO CRITICISM OF APPELLANTS' PRACTICE.

Both the District Court and counsel for appellee have commented with rather unnecessary acerbity upon the appellants' action in appearing twice in Court and arguing first against the granting of the temporary injunction and later, upon affidavits, on a motion to dissolve the temporary injunction. Needless to say, this practice is a usual and proper one in the Federal Courts, allowed both by the rules and the authorities. A late instance may be cited.

> *Western Union etc. Co.* v. *Louisville & N. R. Co.,* 201 Fed. 946, 947, 951.

The reason for such practice is, of course, that the defendants may not be able, in fact, are more than likely to be unable, to appear armed with affidavits and make their best counter-showing on the return day of the order to show cause. Good sense justifies their having an opportunity to present their case in rebuttal on a date selected with some consideration

for their convenience. This being the case, it is somewhat difficult to understand the attitude of the District Court upon the second hearing, as shown by its opinion, which is not a part of the record but which is appended to the appellees' Supplemental Brief (p. 34):

> "I think that every practitioner realizes that when the Court makes an order to show cause why certain relief should not be granted to the other party, on the return day of the order *he should show all the cause he may have.* That is the purpose of giving him that opportunity. *I certainly am not going to encourage a practice which will enable a party to show part of his cause on one day, and then on another day show another cause which he should have shown on the return day.* It has a tendency to trespass upon the patience and good nature of the Court, if I may be permitted to indulge in that expression, and *I do not believe it is the kind of practice that should be encouraged.* That is all I have to say about that, because I assume from the statement made as to the facts of the case, that counsel acted in good faith. He no doubt believed that his objections by way of demurrer, so to speak, to the complaint, were well taken. The Court disagreed with him. That was not unexpected. The Court has to disagree with somebody. And having been thus illy advised, if I may use that phrase, *having been content to meet the order to show cause with an issue of law only,* it seems to me *they ought to take their medicine, and either appeal, or say that the determination of the only issue tendered was right.*" (Italics ours.)

It would almost seem from this language as though the District Court failed to give any weight at all to

the affidavits of the appellants which it insists ought to have been filed at the earlier hearing. The Court's discretion could not but be improvidently exercised at a time when it considered that the appellants had no right to be heard.

> "But discretion (which must be legal discretion, not merely the individual view or will of the particular chancellor) does not extend to a refusal to apply well-settled principles of law to a conceded or indisputable state of facts. If this is not so, Congress did a vain thing in providing at all for appeals from preliminary injunctional decrees."
>
> *Winchester Repeating Arms Co.* v. *Olmsted,* 203 Fed. 493, 494 (C. C. A., 7th Circ.).

Certainly the District Court overlooked the fact that

> "A temporary injunction is at all times subject to motion to vacate or modify, notwithstanding that in granting it the Court may have chosen to discuss the merits of the case."
>
> *Westerly Waterworks* v. *Town of Westerly,* 77 Fed. 783 (Syllabus).

And, further, has not the District Court placed upon the appellants a burden ordinarily placed only upon those guilty of bad faith or dilatory tactics? The dates available from the records are eloquent in this respect; they show anything but delay or sloth upon appellants' part. The bills were filed on November 24, 1914 (Tr., case 2539, pp. 33 and 36). Argument on return of the orders to show cause was had and the matters submitted on December 8, 1914 (Tr., case

2539, p. 38). The injunctions *pendente lite* were granted on December 11, 1914 (Tr., case 2539, p. 45). Notices of motions to dissolve the injunctions, together with affidavits, were received and filed on December 14, 1914 (Tr., case 2539, p. 48). The hearing of the motions was set by appellants for December 19, 1914 (Tr., case 2539, p. 47). They were actually heard and denied on December 21, 1914 (Tr., case 2539, pp. 84 and 85), because of continuance by the Court (Tr., case 2539, p. 81). Appeals were perfected on December 23, 1914 (Tr., case 2539, p. 88), and the appeals argued before the Appellate Court on February 3, 1915.

It is submitted that such dispatch is not customarily met with in the procedure of either the trial or the appellate courts. Can it be said that, even if appellants in the first instance committed an error of procedure, it was tainted with questionable motive? Should the clear vision of the Chancellor refuse scrutiny to the merits of injunction proceedings because of a trivial and harmless misstep in procedure?

OTHER OF APPELLEES' ARGUMENTS.

No other points made by appellee deserve more than this mention: They are either inapplicable or unsound. And as for the meager authorities cited, reference to them warrants their characterization as doubly inapplicable.

CONCLUSION.

Brevity protests against recapitulation in any detail.

Suffice it, therefore, that we point again, in effect, to the propositions of our first briefs:

1. Facts essential to injunction must each be verified, positive, certain, and sufficiently pleaded. The presentation of facts in the instant cases does not measure up to this standard. Therefore there has been reliance upon an erroneous hypothesis of pertinent fact, and consequent reversible error.

2. Even if the presentation of facts be taken as sufficient—and the sufficiency of each essential fact is necessary to constitute the sufficiency of the whole—its effect is overcome by the positive denials found in appellants' affidavits. A fact essential denied, the equity supporting the injunction falls, and with it the reason for the injunction. Dissolution should follow. Denial of dissolution under such circumstances is improvident exercise of discretion; therefore, reversible error.

3. Certain settled rules have been established to guide the Chancellor in the issuance of injunctions. Among these rules primarily is that requiring the statement of facts within the equity jurisdiction. Further among these rules is that of the balance of convenience, that requiring use of all remedies as effective as the injunctional remedy before it may be sought, and that requiring consideration of dictates of public policy. Disregard of any of these rules constitutes an improvident exercise of discretion; therefore, reversible error.

It is respectfully submitted that, in the light of these propositions, the District Court has committed pre-

judicial error warranting reversal of the respective orders granting the injunctions, and the respective orders denying dissolution, together with appellants' costs on these appeals incurred.

Dated, San Francisco, California, March 13th, 1915.

Respectfully submitted,

Charles W. Slack

JOSEPH K. HUTCHINSON

Solicitors for Defendants and Appellants.